United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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To be argued by
HENRY A. BRACHTL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6052

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P/S

DOUGLAS J. BUTURLA,
Plaintiff-Appellant,

—against—

DAVID MATHEWS, Secretary of Health,
Education and Welfare,
Defendant-Appellee.

APPEAL FROM ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

DAVID G. TRAGER,
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DOUGLAS J. BUTURLA,
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—against—

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BRIEF FOR DEFENDANT-APPELLEE

Issue Presented for Review

Whether the District Court erred in determining that the decision of the Secretary of Health, Education and Welfare that Douglas J. Buturla was not disabled within the meaning of the Social Security Act from December, 1969 to May, 1973 is supported by substantial evidence.

Statement of the Case

This is an action against the Secretary of Health, Education and Welfare under Section 205(g) of the Social Security Act (the "Act"), 42 U.S.C. § 405(g), to review a final determination of the Secretary which denied the application of Douglas J. Buturla for a period of disability and disability insurance benefits.

Douglas J. Buturia filed an application for disability insurance benefits on April 14, 1970, claiming that he became unable to work beginning on December 10, 1969 (A. 35-38).* The application was denied, both initially and upon reconsideration (A. 41-42, 46-48). At Buturla's request a hearing was held on May 24, 1971, at which his claim was considered *de novo* (A. 25-34). The Hearing Examiner found that Buturla was not under a disability within the meaning of the Act (A. 9-18), and the Appeals Council denied Buturla's request for review of the decision of the Hearing Examiner on June 29, 1971 (A. 6).

Buturla then commenced this action seeking judicial review. On January 19, 1973, the District Court remanded the matter to the Secretary for further administrative action. Upon a supplementary evidentiary hearing, the Administrative Law Judge on November 9, 1973 determined once again that Buturla is not entitled to a period of disability benefits (A. 108-125). That Buturla is not entitled to a period of disability or to disability insurance benefits became the final decision of the Secretary when the Appeals Council adopted the findings and conclusions of the Administrative Law Judge in its decision of December 8, 1973 (A. 88-91).

Upon the motion of the Secretary of Health, Education and Welfare for judgment on the pleadings, the District Court, the Honorable Jack B. Weinstein, District Judge, presiding, awarded judgment affirming the decision of the Secretary (A. 335-339).

Buturla appeals.

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* Citations to the Appendix appear as "A. —."

The Facts Relevant to the Issue Presented for Review

Buturla's claim is based on a rib and back injury which he sustained on December 10, 1969 in an automobile collision which occurred while he was employed as a patrolman in the New York City Police Department. Buturla was thrown against the right car door, injuring his lower back, right hip region and right lower ribs (A. 56). He was hospitalized for three days immediately following the accident (A. 56), and again for three weeks starting on June 19, 1970 (A. 68).

With the exception of a few days of limited duty (A. 196, 211), Buturla ceased working for the Police Department from the time of the accident until his discharge from the Department on June 15, 1972 because of disability (A. 195). After Buturla's discharge, he spent several days a week for several months observing operations in a real estate office, from about August 1972 to about December 1972 (A. 197-198, 211-212). Pursuant to a recommendation in May, 1973 by his physician that he engage in light work, Buturla began assisting his wife in her dog grooming shop (A. 198). He claims to have been disabled within the meaning of the Social Security Act from the date of his accident, December 10, 1969, to the time his activities in the shop commenced in May, 1973 (A. 213-214).

ARGUMENT

The Secretary's determination that Buturla failed to establish that he meets the statutory standard of disability is supported by substantial evidence.

The claimant bears the burden of proving that he is disabled so as to be entitled to Social Security disability insurance benefits. This requirement is embodied in Section 223(d)(5) of the Act, which provides:

> "An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." 42 U.S. § 423(d)(5).

"Disability" is defined in Section 223(d)(1)(A) as:

> ". . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; . . ." 42 U.S.C. § 423(d)(1)(A).

"[A]n individual . . . shall be determined to be under a disability," Section 223(d)(2)(A) explains,

> ". . . only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . ." 42 U.S.C. § 423(d)(2)(A).

For purposes of § 223(d)(2)(A), "work which exists in the national economy" is defined as:

> "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A).

Furthermore, "substantial gainful work" is not restricted under the statute to work which "exists in the immediate area in which he lives," or by whether or [illegible]

> "a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 423(d)(2)(A).

The applicable termination date of a claimant's alleged disability period is the "close of . . . the second month following the month in which the disability ceases." 42 U.S.C. § 416(i)(2)(D).

The nature of Buturla's injury is not in issue. For purposes of his decision, the Administrative Law Judge accepted claimant's most severe characterization of his injury: that is, noting that Buturla had never had surgery performed and that it could not therefore definitely be stated that he had sustained a herniated disc, the Administrative Law Judge assumed for the purposes of his determination that Buturla *had* suffered that disorder (A. 121). Thus, no issue as to the character of Buturla's injury was presented.

Instead, assuming that Buturla suffered a herniated disc, the issue was whether such an injury constituted a disability under the Act.

Substantial evidence supports the finding of the Administrative Law Judge that Buturla's injury did not constitute a disability within the meaning of the Act.

The evidence of record shows that, following a short recuperative period after his accident, Buturla's residual impairments were not of such severity that he was precluded from returning to types of light or sedentary work for which he was otherwise qualified by virtue of his youth, education, and experience.

Dr. Herman I. Frank, an orthopedic surgeon who testified at the request of the Buturla's attorney, stated at the supplementary hearing that there are many people working full duty with herniated discs (A. 171). Although Dr. Frank indicated that he would not state that Buturla had *no* impairment, in light of his diagnosis of hysteria and psychogenic overlay, he nonetheless testified that

Buturla's actual orthopedic conditions produced no impairment of his ability to stand or sit, and slight impairment in bending his trunk. He said Buturla could walk up to ten blocks with no impairment, could carry, pull, push, or lift up to twenty-five pounds, and could use public transportation (A. 169-171). The doctor stated that his answers would be no different if it were in fact established that Buturla had a herniated disc (A. 171-172). The doctor further indicated that Buturla was capable of sedentary or light physical activity and that this would be true even if he had a herniated disc (A. 172-173).

Dr. Sidney Fishman, a vocational expert who testified at the supplementary hearing, was asked whether, considering certain dysfunctions, Buturla could work at any full-time job based on his age, education, training and work experience. He was asked to assume that Buturla suffered from a back impairment requiring him to wear a lumbosacral brace for support. He was further asked to assume that the job would allow Buturla to remain primarily seated, to have the opportunity to stand at will, and would not require frequent bending or lifting, pulling or pushing more than ten pounds (A. 230-231). The witness indicated that Buturla could perform office clerical jobs (A. 12, 233-236), that he could also do bench assembly work in a variety of light industries in the New York area (A. 233, 236), and that he could work as a bench machine operator or as an inspector (A. 240-241). The witness said all such jobs existed in the New York area and that a majority of employers would hire persons with injuries such as Buturla's * (A. 242-243).

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* It should be noted that in any event, no finding that work is available in claimant's immediate area or that a specific job vacancy exists for him would be required. 42 U.S.C. § 423(d)(2)(a).

The testimony of a vocational expert witness as to the capacity of an individual to perform work activity has been repeatedly accepted. *Ross* v. *Richardson,* 440 F.2d 690 (6th Cir. 1971); *Woods* v. *Finch,* 428 F.2d 469 (3d Cir. 1970); *Gentile* v. *Finch,* 423 F.2d 244 (3d Cir. 1970); *Gray* v. *Finch,* 427 F.2d 33[illegible] (6th Cir. 1970); *Mullins* v. *Gardner* 396 F.2d 139 (6th [illegible] 1968); *Miller* v. *Finch,* 430 F. [illegible] 321 (8th Cir. 1970). The testimony of such a witness need not be based on personal knowledge of the exact nature and duties of the jobs cited as being within a person's capabilities but may instead be based on secondary reference sources. *Rose* v. *Cohen,* 406 F.2d 753 (6th Cir. 1969); *Schmidt* v. *Secretary of H.E.W.,* 299 F. Supp. 1315 (D.P.R. 1969). It has been held further that under the Act the Secretary may take administrative notice of jobs the claimant can do. *Brown* v. *Finch,* 429 F.2d 80 (5th Cir. 1970); *Breaux* v. *Finch,* 421 F.2d 687 (5th Cir. 1970).

Buturla has testified to severe pain in his back and lower right leg (A. 30), and has stated that he found himself unable to perform limited police duty (A. 30). Nevertheless, Buturla was able to observe activities in a real estate office for several months (A. 197), driving to and from the office, and his failure to enter that line of business was not a result of physical inability to engage in that work but rather because he "decided against it" (A. 198). Further, Dr. David M. Bosworth, an orthopedic surgeon who examined Buturla on January 18, 1971, found that while disabled for general police duty, Buturla was not disabled for limited duty (A. 73), and also reported on May 16, 1972 that restricted status was possible except during possible periods of aggravated pain (A. 273). Moreover, the Police Pension Fund Medical Board reported essentially negative findings on January 19, 1972 (A. 271).

There was a suggestion that Buturla undergo spinal surgery, but he declined to undergo such surgery and returned to work in May, 1973 without it (A. 31).

Buturla claimed receipt of a police disability pension and a sum of money in a court action arising out of his back injury (A. 195, 215). However, it is well established that findings of disability by other governmental or non-governmental agencies are not determinative of the issue of disability under the Social Security Act, since the definitions of disability under the various programs may not be the same. Thus, the fact that Buturla has been found to be disabled for purposes of the Police Department or other agencies or programs is not controlling as to the Secretary. *Soto* v. *Secretary of Health, Education and Welfare,* 308 F. Supp. 603 (D.P.R. 1970) (military disability discharge); *Zimbalist* v. *Richardson,* 334 F. Supp. 1350 (E.D.N.Y. 1971) (determination of Veterans Administration of total disability); *McMullin* v. *Richardson,* 350 F. Supp. 467 (E.D. Va. 1972) (military disability discharge); *Collier* v. *Richardson,* 344 F. Supp. 768 (W.D. Va. 1972) (state industrial commission); *Hash* v. *Richardson,* 322 F. Supp. 267 (W.D. Va. 1971) (U.S. Public Health Services determination of disability); *Ratliff* v. *Richardson,* 445 F.2d 440 (5th Cir. 1971) (employer's disability program); *Echols* v. *Gardner,* 276 F. Supp. (S.D. Tex. 1967) (military disability discharge); *Gee* v. *Celebrezze,* 355 F.2d 849 (7th Cir. 1966), *cert. denied, Gee* v. *Gardner,* 385 U.S. 856 (1966) (determinations of "other agencies" made on the basis of different standards); *Little* v. *Richardson,* 471 F.2d 715 (9th Cir. 1972) (state agency determination of disability); *Branch* v. *Finch,* 313 F. Supp. 337 (D. Kansas 1970) (determination of disability by state or some other agency).

As noted above, in order to establish entitlement to a period of disability and disability insurance benefits, Buturla had the burden of establishing that he was unable to engage in substantial gainful activity by reason of a physical or mental impairment the existence of which is demonstrated by evidence supported by objective data ob-

tained by medically acceptable clinical and laboratory techniques, at a time when he met the insured status requirements of the Act. 42 U.S.C. § 423(d)(5); *DeNafo* v. *Finch*, 436 F.2d 737 (3d Cir. 1971); *Reyes Robles* v. *Finch*, 409 F.2d 84 (1st Cir. 1969); *Franklin* v. *Secretary of H.E.W.*, 393 F.2d 640 (2d Cir. 1968); *Peterson* v. *Gardner*, 391 F.2d 208 (2d Cir. 1968).

On the evidence of record, the Secretary determined that Douglas J. Buturla failed to establish that he was under a disability within the meaning of the Act. It is submitted that the Secretary's determination is reasonable and should be affirmed by this Court, as it was by the District Court, as a determination supported by substantial evidence. 42 U.S.C. § 405(g). *Richardson* v. *Perales*, 402 U.S. 389 (1971); *Levine* v. *Gardner*, 360 F.2d 727 (2d Cir. 1969); *DeJesus Faria* v. *Secretary of H.E.W.*, 336 F. Supp. 1069 (D.P.R. 1971).

CONCLUSION

The District Court's award of judgment on the pleadings for the Secretary of Health, Education and Welfare should be affirmed, for the Secretary's determination that Douglas J. Buturla was not disabled within the meaning of the Social Security Act rests on substantial evidence.

Respectfully submitted,

Dated: September 29, 1975

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Lydia Fernandez
LYDIA FERNANDEZ

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1st day of October 19 75

Olga S. Morgan

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Qualified in Kings County
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